THE UNCONSTITUTIONALITY OF THE ATTORNEY'S LIEN LAW IN PENNSYLVANIA.—The law has made great progress in protecting members of the bar since Blackstone wrote that "a counsel can maintain no action for his fees, which are given not as *locatio vel conductio*, but as *quiddam honorarium;* not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation."[1] Although barristers still suffer this restriction in England,[2] solicitors may now recover their fees when taxed by the court.[3] The members of the bars of the various jurisdictions in the United States have been fortunate in that this civil law principle has never become a part of the common law of any of the states. It is true that in the case of *Mooney v. Lloyd*,[4] decided by the Supreme Court of Pennsylvania in 1819, Chief Justice Tilghman refused to allow an attorney to maintain an action for fees, declaring that "without doubt, no such action lies at common law." But eleven years later, that court abandoned such a doctrine in a case,[5] the report of which concludes with the significant statement that "Gibson, C. J., expressed his satisfaction in overruling the case of *Mooney v. Lloyd*." In New York, too, as late as 1840, it was argued that "at common law a counselor cannot maintain an action for his fees"; that "such is undeniably the law of England, and in this state it has not been held otherwise, the question never having been directly brought up for adjudication." The New York court, however, had no difficulty in holding otherwise, and allowed the action.[6] And such is the uniformly recognized law in all of the United States.[7]

In addition to the right to bring an action of debt for the amount of his costs, an attorney has the right to retain the property that has come into his hands in the course of his employment. He has a right to retain as well as a right to sue—a *jus in rem* as well as a *jus in personam*. This is a principle of the common law, and is not derived from any statutes; although, according to Lord St. Leonards,[8] it is a comparatively modern development. It is necessary to ascertain on what property this right of lien may be exercised.

All authorities are agreed that papers and deeds, or funds, or other property of the client which may be in the hands of the attorney, are subject to this lien. It is known as a passive lien if the property of the client so held by the attorney is in the form

[1] Blackstone: Commentaries, Book III, p. 27.
[2] Kennedy v. Broun, 13 C. B. (N. S.) 677 (Eng. 1863).
[3] Solicitor's Remuneration Act of 1881, Annual Practice, Part IV, Division 3.
[4] 5 S. & R. 412 (Pa. 1819).
[5] Gray v. Brackenridge, 2 P. & W. 75 (Pa. 1830).
[6] Stevens v. Adams, 23 Wendell 57 (N. Y. 1840); affirmed, sub nom. Adams v. Stevens, 26 Wendell 451 (N. Y. 1841).
[7] Stanton v. Embrey, 93 U. S. 548 (1876); Stevens v. Monges, 1 Harrington 127 (Del. 1832); Clay v. Moulton, 70 Me. 315 (1879).
[8] Blunden v. Desart, 2 Drury & Warren 405, 427 (Eng. 1842).

of documents. In such case, the attorney cannot actually realize on his client's papers by selling them, but can only retain them until his claim is satisfied.[9] On the other hand, if the property consists of funds, the attorney can at once exercise his lien by deducting the amount of his claim from them.[10] This is known as an active lien. Even in Pennsylvania, where an attorney's lien upon moneys collected is hardly recognized under that name, but is called rather a right of defalcation,[11] a court of equity will protect an attorney who is entitled to a compensation out of a fund within its control.[12] This was the extent of the attorney's lien at common law.

In 1860, the Solicitor's Act was passed in England; and by its 28th Section it was provided that where a solicitor is employed to prosecute or defend an action or other proceeding in any court of justice, it shall be lawful for the court to give him a charge upon the property, which shall have been recovered or preserved through his instrumentality, for his costs. Subsequently, in many jurisdictions of the United States, the client's cause of action has been subjected to this so-called "charging lien" by acts of legislature.[13]

Falling in line with this tendency of the times, the legislature of Pennsylvania passed an act[14] in 1915, in substance the same as those of the other states. It provided that "from the commencement of any action or proceeding, either at law, in equity, or otherwise, ... or the filing of any counter-claim or any pleading, the attorney who appears of record for a party therein shall have a lien for his compensation for his services upon his client's cause of action, claim, or counterclaim, which shall attach to any award, order, report, decision, compromise, settlement, verdict, or judgment in the client's favor, and the proceeds thereof in whosesoever hands they may come, etc.;" and that "the court in which the cause is brought shall, on the petition of the client or attorney, have jurisdiction to determine and enforce the lien."

The recent case of *Laplacca v. Phila. Rapid Transit Co.*[15] put the statute to the test; and the supreme court of the state held

[9] Young v. English, 7 Beavan 10 (Eng. 1843); *in re* Gillaspie, 190 Fed. 88 (1911).

[10] Welsh v. Hole, 1 Douglas 237 (Eng. 1779); *in re* Paschal, 77 U. S. 483 (1870); Dowling v. Eggeman, 47 Mich. 171, 10 N. W. 187 (1881).

[11] Dubois' Appeal, 38 Pa. 231 (1861).

[12] McKelvy's Appeal, 108 Pa. 615 (1885); Freeman v. Shreve, 86 Pa. 135 (1878).

[13] Johnson v. McCurry, 102 Ga. 471, 31 S. E. 88 (1897); Hubbard v. Ellithorpe, 135 Ia. 259, 112 N. W. 796 (1907); Kansas-Pacific R. R. v. Thacher, 17 Kan. 92 (1876); McIntosh v. Bach, 110 Ky. 701, 62 S. W. 515 (1901); Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701 (1907); O'Connor v. St. Louis Transit Co., 198 Mo. 622, 97 S. W. 150 (1906); Lewis v. Omaha St. Rwy. Co., 114 N. W. 281 (Neb. 1907); Fischer-Hansen v. Brooklyn Heights Co., 173 N. Y. 492, 66 N. E. 395 (1903); Sidoway v. Jones, 125 Tenn. 322, 143 S. W. 893 (1911); Comp. Laws of Utah, Sec. 135; McRea v. Warehime, 49 Wash. 194, 94 Pac. 924 (1908).

[14] Act of May 6, 1915, P. L. 261.

[15] 265 Pa. 304 (1919); affirming 68 Pa. Super. Ct. 208 (1916).

that, in enacting it, the legislature had overstepped the barrier raised by Article III, Section 7, of the Pennsylvania Constitution, which declares: "The General Assembly shall not pass any local or special law authorizing the creation, extension, or impairing of liens . . . or providing or changing methods for the collection of debts." It will be noticed that all legislation relating to the creating of liens, or providing new methods for the collection of debts, is not prohibited by the Constitution, but such only as comes within the definition of local or special laws. The act applies generally to the entire state and hence is not local. But the court considers that a statute affecting only lawyers and extending to them rights and privileges in the collection of their fees, not accorded to members of other professions, is special legislation, and therefore unconstitutional.

It is interesting to note that when a similar statute was held constitutional in spite of a like provision in the Missouri Constitution, the supreme court[16] of that state relied on a Pennsylvania decision for its conception of a special law. "It is clearly not special legislation," so runs the opinion, "on the ground that it simply applies to attorneys-at-law. The distinction between general and special laws has been very clearly drawn by numerous cases in this state. The rule upon this subject as announced by the Supreme Court of Pennsylvania in *Wheeler v. Philadelphia*, 77 Pa. 338, has repeatedly met the approval of this court. It is there held that 'a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special.'"

However, those states which do not have prohibitions in their constitutions against special laws, realize that the attorney's lien acts are such; but, being free from constitutional restraint, they uphold and approve them. "Those who follow the legal profession constitute a class," says the leading Illinois case,[17] "and laws may be passed applicable only to members of a class where the classification rests upon some disability, attribute, or classification marking them as proper objects for the operation of such special legislation, *in any case wherein such local or special legislation is not expressly forbidden by the constitution.*" Pennsylvania is one case where it is so expressly forbidden by the Constitution.

It is true that the attitude of the Pennsylvania courts has always been unfavorable to acts of the legislature creating new liens or extending old ones for the benefit of particular professions or trades;[18] and in spite of the broad rule laid down in *Wheeler v. Philadelphia*[19] and relied on by the Missouri courts, it has recog-

[16] O'Connor v. St. Louis Transit Co., *supra.*

[17] Standidge v. Chicago Rwy. Co., 254 Ill. 524, 98 N. E. 963 (1912).

[18] Sauer v. Doerfer, 22 Pa. Dist. 39 (1912), *architects;* Michaels v. Cunningham, 20 Pa. Dist. 110 (1910), *boarding-house keepers' lien on salaries;* Strine v. Foltz, 113 Pa. 349 (1886), *sheriffs and prothonotaries;* Vulcanite Cement Co. v. Allison, 220 Pa. 382 (1908), *mechanics' lien on moneys in hands of third party.*

[19] 77 Pa. 338 (1875).

nized special laws for a certain class only where the classification was required by urgent public necessity.[20] However, without Article III, Section 7, of the Pennsylvania Constitution, the Attorney's Lien Act of 1915 would undoubtedly be enforceable. Without that constitutional prohibition, the members of the Pennsylvania bar would be in the same favorable position as are the lawyers in many of the United States, and as are the solicitors in England.

Just as changing conditions brought about a departure from the old honorarium system, just as counsel's right of action for his fee was found to be a necessary substitute for the political prestige which was formerly his only reward, so today the legislatures of the country are realizing the necessity of giving the lawyer a safeguard such as the ordinary business man has. A lender can demand an indorser on a note; a builder can demand a surety on the contractor's bond; a manufacturer can sell his product on a bailment lease and yet retain title to it. But a lawyer, in practice, cannot obtain any guarantee for his fees. Yet, because of the nature of his profession, he must often accept the case of a client whom he knows to be poor or irresponsible, and of whose honesty he has no proof. If such a client pockets the fruits of the litigation, a suit and judgment against him for fees would be a farce. And such a contingency is far from unlikely, in these days of claim departments and indemnity companies, where one of the chief inducements for settlement is the client's knowledge that he can collect all the money, and neglect to pay the attorney whom he has retained and through whose efforts the case has been brought up to the point of settlement.

Looking to the ultimate result, it will also be seen that it is to the client's interest that there should be an enforceable attorney's lien law. For one who has a grievance, be it great or small, will the more readily find a lawyer, a better lawyer, and one who will devote his best efforts to the case, if there is the certainty that the client will not reap all the benefits and the attorney have naught but the labor. However, under the present constitution of Pennsylvania, an attorney's lien law is impossible. The mistake, if it be such, can only be corrected by constitutional amendment or revision. *A. L.*

RIGHT OF THE STATE TO ALTER CONTRACT OR FRANCHISE RATES OF PUBLIC UTILITIES.—The extent to which agreements as to rates of service contained in contracts between public service companies and the consumer, or in franchises granted by municipal or state governments, are binding, is a question of vital importance to public utility companies all over the country. Rates which originally yielded a return commensurate with the risk involved in such undertakings, the capital invested therein, and the service

[20] Commonwealth v. Hanley, 15 Pa. Super. Ct. 271 (1900), *undertakers;* Commonwealth v. Jones, 4 Pa. Super. Ct. 362 (1897), *miners.*